Utama Motor Workshop (S) Sdn Bhd v Besicon Engineering Works Sdn Bhd

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24C-4–01 OF 2022
WONG KIAN KHEONG J
13 JUNE 2022

Building and Construction Law — Adjudication — Adjudication decision — Setting aside — Validity of adjudication decision — Whether adjudicator 'made' adjudication decision within prescribed time period under s 12(2)(a) and (b) of Construction Industry Payment and Adjudication Act 2012 ('CIPAA') — Whether there were parties' agreement pursuant to s 12(2)(c) of CIPAA — Whether adjudicator had power under s 12(1) read with s 25(p) of CIPAA to extend unilaterally prescribed time period under s 12(2)(a) and (b) of CIPAA — Whether plaintiff was estopped from relying on breach of s 12(2) of CIPAA to set aside adjudication decision — Whether plaintiff could acquiescence to breach of s 12(2) of CIPAA — Whether adjudicator had exceeded his jurisdiction — Whether adjudicator should refund fees/expenses to parties — Whether court could grant declaration regarding adjudication decisions — Whether court should award costs — Construction Industry Payment and Adjudication Act 2012 ss 4, 12(1), (2)(a), (b), (c), (3), 13(c), 15(d), 19(6) & 25(p) — Construction Industry Payment and Adjudication Regulations 2014 reg 8(2)(b) — Rules of Court 2012 O 15 r 16 & O 59 r 3(2) — Specific Relief Act 1950 s 41

The crux of the present case was in relation to the validity of the adjudication decision ('the AD') issued by the adjudicator in favour of the defendant with respect to the failure of the plaintiff to pay the defendant for the construction work completed by the defendant. Prior to the release of the AD on 14 December 2021, the adjudicator had on 3 December 2021 sent an email ('the adjudicator's email') to the parties that the latest date for the issuance of the AD was on 15 December 2021 but there was no reply to this email by both parties. In the present originating summons ('the OS'), the plaintiff had sought for the following orders: (a) a declaration that the AD was void under s 12(3) of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'); (b) the entire AD be set aside by the court pursuant to s 15(d) of the CIPAA; (c) all fees and expenses paid to the adjudicator by both the plaintiff and defendant be refunded to the respective parties; and (d) costs of the OS shall be borne by the defendant. The issues arose were: (i) when were adjudicators required to 'make' adjudication decisions; (ii) whether the adjudicator 'made' the AD within the prescribed time period under s 12(2)(a) and (b) of the CIPAA ('the prescribed time period'); (iii) whether there was parties' agreement pursuant to s 12(2)(c) of the CIPAA; (iv) whether the adjudicator had power

under s 12(1) read with s 25(p) of the CIPAA to extend unilaterally the prescribed time period; (v) whether the plaintiff was estopped from relying on the breach of s 12(2) of the CIPAA ('the breach') to set aside the AD; (vi) whether the plaintiff could acquiescence to the breach; (vii) whether the adjudicator had exceeded his jurisdiction; (viii) whether the adjudicator should refund the fees/expenses to the parties; (ix) whether the court could grant declaration regarding adjudication decisions; and (x) whether the court should award costs.

Held, allowing the OS:

(1) Section 4 of the CIPAA had defined an 'adjudication decision' as a decision 'made' by an adjudicator under s 12(2) of the CIPAA. Section 12(3) of the CIPAA mandatorily required an adjudicator to 'make' an adjudication decision within any one of the three prescribed time periods. As such, the key word was 'made' and not 'decide', 'deliver' or 'release'. In the present case, after excluding the weekends and two public holidays, the 45 days prescribed time period ended on 13 December 2021, but the AD was 'signed and issued' by the adjudicator on 14D ecember 2021 which showed that the AD was 'made' on 14 December 2021. Therefore, the AD had not been made within the prescribed time period and the adjudicator had exceeded his jurisdiction within the meaning of s 15(d) of the CIPAA when he 'made' the AD on 14 December 2021, beyond the prescribed time period. Since the adjudicator failed to 'make' the AD within the prescribed time period, the adjudicator was obliged to make the mandatory refund pursuant to s 19(6) of the CIPAA and reg 8(2)(b) of the Construction Industry Payment and Adjudication Regulations 2014 (see paras 11, 13, 23 & 27).

(2) The court could not agree with the defendant's submission that the failure of the parties to reply to the adjudicator's email stating that the latest date for the issuance of the AD was on 15 December 2021 showed that the parties had agreed to extend the prescribed time period pursuant to s 12(2)(c) of the CIPAA. Form 13 in Schedule 1 to the Adjudication Rules and Procedure provided for a written request by an adjudicator to the parties for the parties' agreement under s 12(2)(c) of the CIPAA. It was clear from Form 13 that before there could be any parties' agreement, there must have been a written request by the adjudicator in question but there was no such request in the present case. Further, in the case of *MRCB Builders Sdn Bhd v SMM Resources Sdn Bhd and another case* [2021] MLJU 1455, the High Court had held that an adjudicator was required to obtain the parties' agreement under s 12(2)(c) of the CIPAA and had 'no power to unilaterally extend' the prescribed time period (see para 15).

(3) The adjudicator had no power to extend unilaterally the prescribed time period. Section 25(p) of the CIPAA only applied to 'any time limit imposed on the parties' (not adjudicators) under the CIPAA. Section 25(p) did not apply to a time period imposed on adjudicators, such as the said prescribed time period. It was therefore clear that a literal interpretation of s 25(p) of the CIPAA did not support the adjudicator's power under the said provision to extend the prescribed time period. If s 25(p) of the CIPAA allowed an adjudicator to unilaterally extend the prescribed time period, this would inevitably delay adjudication proceedings and was thereby inconsistent with the object of the CIPAA. In other words, a purposive construction of s 25(p) of the CIPAA clearly showed the intention of legislature that s 25(p) did not empower adjudicators to extend the prescribed time period (see para 18).

(4) The equitable estoppel doctrine and the doctrine of acquiescence were based on case law. Case law was subject to written law which embodied the intention of the legislature. In this case, both doctrines could not apply in view of the mandatory provisions of s 12(2)(a)–(c) and (3) of the CIPAA. If the court applied both doctrines to bar the enforcement of the breach, this would render redundant the mandatory provisions of s 12(2)(a) to (c) and (3) of the CIPAA. Such an outcome clearly frustrated the object of the CIPAA (see paras 20 & 22).

(5) As explained in the case of *Ou Yang Chow Min (berniaga sebagai Ou Yang Architect) v Alfa Lagenda Sdn Bhd and another case* [2021] MLJU 130 ('Ou Yang Chow Min'), in view of s 13(c) of the CIPAA, the court had no power under s 41 of the Specific Relief Act 1950 ('the SRA') and O 15 r 16 of the Rules of Court 2012 ('the ROC') to grant any declaration in proceedings under CIPAA regarding the dispute between the parties which could only be finally resolved by way of litigation or arbitration, whichever applicable ('the parties' dispute'). In the present case, the plaintiff was merely applying for a declaration regarding the validity of the AD under s 12(3) of the CIPAA. The plaintiff did not apply for any declaration regarding the parties' dispute. As such, *Ou Yang Chow Min* was clearly distinguishable from the OS. Based on the evidence and reasons stated above, the court exercised its discretion pursuant to s 41 of the SRA and O 15 r 16 of the ROC to declare that the AD was void under s 12(3) of the CIPAA (see paras 32–34).

(6) Order 59 r 3(2) of the ROC had provided for 'costs to follow the event' ('the general rule') unless there was a reason for the court to exclude the application of the general rule. In the present case the AD was void under s 12(3) of the CIPAA solely because of the adjudicator's failure to comply with the prescribed time period ('the adjudicator's fault'). The adjudicator's fault constituted a sufficient reason for the court to exercise its discretion pursuant to O 59 rr 2(2) and 3(2) of the ROC to depart

from the general rule. Accordingly, in view of the adjudicator's fault, it was only just for the court not to award any costs to be paid by the defendant to the plaintiff in the OS (see paras 36–37).

[Bahasa Malaysia summary

Intipati kes ini adalah berhubung dengan keabsahan keputusan adjudikasi ('AD') yang dikeluarkan oleh adjudikator yang memihak kepada defendan berkenaan dengan kegagalan plaintif membayar defendan bagi kerja pembinaan yang telah disiapkan oleh pihak defendan. Sebelum pengeluaran AD pada 14 Disember 2021, adjudikator telah pada 3 Disember 2021 menghantar emel ('emel adjudikator') kepada pihak-pihak bahawa tarikh terakhir untuk pengeluaran AD adalah pada 15 Disember 2021 tetapi kedua-dua pihak tidak membalas emel tersebut. Dalam saman pemula semasa ('SP'), plaintif telah memohon perintah-perintah berikut: (a) pengisytiharan bahawa AD tersebut tidak sah di bawah s 12(3) Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP'); (b) keseluruhan AD diketepikan oleh mahkamah menurut s 15(d) APAIP; (c) semua fi dan perbelanjaan yang dibayar kepada adjudikator oleh kedua-dua plaintif dan defendan dikembalikan kepada pihak-pihak; dan (d) kos SP hendaklah ditanggung oleh defendan. Isu-isu yang timbul ialah: (i) bilakah adjudikator dikehendaki 'membuat' keputusan adjudikasi; (ii) sama ada adjudikator 'membuat' AD dalam tempoh masa yang ditetapkan di bawah s 12(2)(a) dan (b) APAIP ('tempoh masa yang ditetapkan'); (iii) sama ada terdapat persetujuan pihak-pihak menurut s 12(2)(c) APAIP; (iv) sama ada adjudikator mempunyai kuasa di bawah s 12(1) dibaca bersama s 25(p) APAIP untuk melanjutkan secara *unilateral* tempoh masa yang ditetapkan; (v) sama ada plaintif telah dihalang daripada bergantung pada pelanggaran s 12(2) APAIP ('pelanggaran tersebut') untuk mengenepikan AD; (vi) sama ada plaintif boleh bersetuju dengan pelanggaran tersebut; (vii) sama ada adjudikator telah melebihi bidang kuasanya; (viii) sama ada adjudikator harus membayar balik fi/perbelanjaan kepada pihak-pihak; (ix) sama ada mahkamah boleh memberikan pengisytiharan mengenai keputusan adjudikasi; dan (x) sama ada mahkamah patut memberikan kos.

Diputuskan, membenarkan SP:

(1) Seksyen 4 APAIP telah mentakrifkan 'keputusan adjudikasi' sebagai keputusan yang 'dibuat' oleh adjudikator di bawah s 12(2) APAIP. Seksyen 12(3) APAIP secara mandatori menghendaki seorang adjudikator untuk 'membuat' keputusan adjudikasi dalam mana-mana satu daripada tiga tempoh masa yang ditetapkan. Oleh itu, kata kuncinya adalah 'dibuat' dan bukan 'memutuskan', 'menyampaikan' atau 'mengeluarkan'. Dalam kes ini, setelah mengecualikan hujung minggu dan dua cuti umum, tempoh masa 45 hari yang ditetapkan berakhir pada 13 Disember 2021, tetapi AD tersebut telah 'ditandatangani dan

dikeluarkan' oleh adjudikator pada 14 Disember 2021 yang menunjukkan bahawa AD tersebut telah 'dibuat' pada 14 Disember 2021. Oleh itu, AD tersebut tidak dibuat dalam tempoh masa yang ditetapkan dan adjudikator telah melebihi bidang kuasanya dalam pengertian s 15(d) APAIP apabila beliau 'membuat' AD pada 14 Disember 2021, melebihi tempoh masa yang ditetapkan. Memandangkan adjudikator gagal 'membuat' AD dalam tempoh masa yang ditetapkan, adjudikator diwajibkan membuat bayaran balik mandatori menurut s 19(6) APAIP dan peraturan 8(2)(b) Peraturan-peraturan Pembayaran Industri Pembinaan dan Adjudikasi 2014 (lihat perenggan 11, 13, 23 & 27).

(2) Mahkamah tidak bersetuju dengan hujahan defendan bahawa kegagalan pihak-pihak membalas emel adjudikator yang menyatakan tarikh terakhir pengeluaran AD adalah pada 15 Disember 2021 menunjukkan pihak-pihak bersetuju untuk melanjutkan tempoh masa yang ditetapkan menurut s 12(2)(c) APAIP. Borang 13 dalam Jadual 1 kepada Peraturan-Peraturan dan Prosedur Adjudikasi memperuntukkan supaya permintaan bertulis dibuat oleh adjudikator kepada pihak-pihak untuk perjanjian pihak-pihak di bawah s 12(2)(c) APAIP. Jelas daripada Borang 13 tersebut bahawa sebelum ada persetujuan mana-mana pihak, mesti ada permintaan bertulis oleh adjudikator tetapi tidak ada permintaan sedemikian dalam kes ini. Selanjutnya, dalam kes *MRCB Builders Sdn Bhd v SMM Resources Sdn Bhd and another case* [2021] MLJU 1455, Mahkamah Tinggi telah memutuskan bahawa seorang adjudikator dikehendaki mendapatkan persetujuan pihak-pihak di bawah s 12(2)(c) APAIP dan adjudikator 'tiada kuasa untuk melanjutkan secara *unilateral*' tempoh masa yang ditetapkan (lihat perenggan 15).

(3) Adjudikator tidak mempunyai kuasa untuk melanjutkan secara *unilateral* tempoh masa yang ditetapkan. Seksyen 25(p) APAIP hanya terpakai kepada 'apa-apa had masa yang dikenakan ke atas pihak-pihak' (bukan adjudikator) di bawah APAIP. Seksyen 25(p) tidak terpakai kepada tempoh masa yang dikenakan ke atas adjudikator, seperti tempoh masa yang ditetapkan tersebut. Oleh itu, adalah jelas bahawa tafsiran literal s 25(p) APAIP tidak menyokong kuasa adjudikator di bawah peruntukan tersebut untuk melanjutkan tempoh masa yang ditetapkan. Jika s 25(p) APAIP membenarkan seorang adjudikator untuk melanjutkan tempoh masa yang ditetapkan secara *unilateral*, ini pasti akan menangguhkan prosiding adjudikasi dan dengan itu tidak konsisten dengan objektif APAIP. Dalam erti kata lain, tafsiran bertujuan bagi s 25(p) APAIP jelas menunjukkan hasrat badan perundangan bahawa s 25(p) tidak memberi kuasa kepada adjudikator untuk melanjutkan tempoh masa yang ditetapkan (lihat perenggan 18).

(4) Doktrin ekuiti 'estoppel' dan doktrin 'acquiescence' adalah berdasarkan

kes-kes yang diputuskan. Kes-kes yang diputuskan adalah tertakluk kepada undang-undang bertulis yang merangkumi niat badan perundangan. Dalam kes ini, kedua-dua doktrin tidak boleh terpakai berdasarkan peruntukan mandatori s 12(2)(a) hingga (c) dan (3) APAIP. Jika mahkamah menggunakan kedua-dua doktrin tersebut untuk menghalang penguatkuasaan pelanggaran tersebut, ini akan menyebabkan peruntukan mandatori s 12(2)(a) hingga (c) dan (3) APAIP menjadi sia-sia. Kesan yang sedemikian jelas mengecewakan objektif APAIP (lihat perenggan 20 & 22).

(5) Seperti yang dijelaskan dalam kes *Ou Yang Chow Min (berniaga sebagai Ou Yang Architect) v Alfa Lagenda Sdn Bhd and another case* [2021] MLJU 130 ('Ou Yang Chow Min'), berdasarkan s 13(c) APAIP, mahkamah tidak mempunyai kuasa di bawah s 41 Akta Relief Spesifik 1950 ('ARS') dan A 15 k 16 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') untuk memberikan apa-apa pengisytiharan dalam prosiding di bawah APAIP mengenai pertikaian antara pihak yang hanya boleh diselesaikan dengan cara litigasi atau timbang tara, yang mana berkenaan ('pertikaian pihak-pihak'). Dalam kes ini, plaintif hanya memohon pengisytiharan berhubung keabsahan AD tersebut di bawah s 12(3) APAIP. Plaintif tidak memohon apa-apa pengisytiharan berhubung pertikaian pihak-pihak. Oleh itu, *Ou Yang Chow Min* jelas boleh dibezakan daripada SP ini. Berdasarkan keterangan dan alasan-alasan yang dinyatakan di atas, mahkamah menggunakan budi bicaranya menurut s 41 ARS dan A 15 k 16 KKM 2012 untuk mengisytiharkan bahawa AD tersebut adalah terbatal di bawah s 12(3) APAIP (lihat perenggan 32–34).

(6) Aturan 59 k 3(2) KKM 2012 telah memperuntukkan 'kos itu mengikut keadaan' ('peraturan am') melainkan terdapat sebab untuk mahkamah mengecualikan pemakaian peraturan am tersebut. Dalam kes ini AD tersebut telah terbatal di bawah s 12(3) APAIP semata-mata kerana kegagalan adjudikator untuk mematuhi tempoh masa yang ditetapkan ('kesalahan adjudikator'). Kesalahan adjudikator tersebut merupakan sebab yang mencukupi untuk mahkamah menggunakan budi bicaranya menurut A 59 kk 2(2) dan 3(2) KKM 2012 untuk menggunakan pengecualian di bawah peraturan am tersebut. Sehubungan itu, mengambil kira kesalahan adjudikator tersebut, keadilan memerlukan mahkamah untuk tidak memerintahkan apa-apa kos untuk dibayar oleh defendan kepada plaintif dalam SP ini (lihat perenggan 36–37).]

Cases referred to

Celtex Supreme Sdn Bhd v Mega Bina Garisan Sdn Bhd [2021] MLJU 2061; [2021] 1 LNS 630, HC (refd)

Cubbitt Building and Interiors Ltd v Fleetglade Ltd [2006] 110 ConLR 36, HC (refd)

Granstep Development Sdn Bhd v Tan Chong Heng Construction Sdn Bhd and other cases [2021] MLJU 2473, HC (refd)
Integral Acres Sdn Bhd v BCEG International (M) Sdn Bhd and other cases [2021] MLJU 1889; [2021] 6 MLRH 540, HC (refd)
IRDK Ventures Sdn Bhd v Econpile (M) Sdn Bhd and another appeal [2020] MLJU 939; [2020] 5 MLRA 515, CA (refd)
Jambatan Merah Sdn Bhd v Public Bank Berhad [2015] MLJU 1208; [2016] 1 CLJ 811, HC (refd)
MRCB Builders Sdn Bhd v SMM Resources Sdn Bhd and another case [2021] MLJU 1455, HC (folld)
Ou Yang Chow Min (trading as Ou Yang Architect) v Green Venture Capital Sdn Bhd and another case [2021] MLJU 130, HC (distd)
Pasukhas Sdn Bhd v Empire Multiple Sdn Bhd and another appeal [2019] MLJU 1393; [2019] 1 LNS 757, HC (refd)
Skyworld Development Sdn Bhd v Zalam Corp Sdn Bhd and other appeals [2019] MLJU 162, HC (folld)
Syarikat Faiza Sdn Bhd & Anor v Faiz Rice Sdn Bhd & Anor and another case [2019] 7 MLJ 175, HC (refd)

Legislation referred to

Civil Law Act 1956 s 3
Construction Industry Payment and Adjudication Act 2012 ss 4, 12(1), (2), (2)(a), (2)(b), (2)(c), (3), (5), 13(a), (c), 15, 15(d), 19(5), (6), 25(p), 32(a), (b), (c), (d), 33(1), (2), 38(a), (b), (c), (d), 39
Construction Industry Payment and Adjudication Regulations 2014 reg 8(1)(e), (2)(b)
Interpretation Acts 1948 and 1967 s 2(1)(a), 3, 17A
Rules of Court 2012 O 15 r 16, O 59 rr 2(2), 3(2)
Specific Relief Act 1950 s 41
Trade Marks Act 1976 (repealed by Trademarks Act 2019)
Trademarks Act 2019

Ooi Huey Miin (with Himin Ng) (Raja, Darryl & Loh) for the plaintiff.
Alvin Tan Chi Sian (with Rosamirah Insyirah bt Zamri) (PY Hoh & Tai) for the defendant.

Wong Kian Kheong J:

THREE NOVEL ISSUES

[1] This originating summons ('OS') is a case of first impression regarding the following three questions:

(a) does an adjudicator have power under s 12(1) read with s 25(p) of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') to extend the '45 working days' time period prescribed in

s 12(2)(a) of the CIPAA ('prescribed time period (s 12(2)(a))') for the adjudicator to 'make' the adjudication decision? and

(b) if the answer to the above issue is 'no':

(i) whether the doctrine of equitable estoppel bars a party against whom an adjudication decision is made (X) from applying to court to set aside the adjudication decision on the ground that the adjudication decision is void under s 12(3) of the CIPAA because the adjudication decision has been 'made' beyond the prescribed time period (s 12(2)(a)) (breach (s 12(2))); and

(ii) can X acquiesce to the breach (s 12(2))?

BACKGROUND

[2] By way of a construction contract dated 15 December 2018 ('contract), the plaintiff company ('plaintiff') had appointed the defendant company ('defendant') to build a three-storey car service workshop and office in Selangor Darul Ehsan ('works').

[3] The defendant had commenced adjudication proceedings under CIPAA against the plaintiff ('AP'). In the AP:

(a) the defendant had claimed for a sum of RM2,013,509.65 from the plaintiff for works which had been performed by the defendant but had not been paid by the plaintiff to the defendant under the contract ('defendant's claim');

(b) the Director of Asian International Arbitration Centre ('AIAC') had appointed Encik Masoud Moinfar ('adjudicator') to adjudicate the defendant's claim;

(c) the plaintiff was represented by Messrs Darryl, Edward & Co ('plaintiff's solicitors (AP)'). Messrs Raja, Darryl and Loh now represent the plaintiff in this OS. Messrs PY Hoh & Tai acted on behalf of the defendant ('defendant's solicitors (AP)');

(d) at 10.02am, 8 October 2021, the adjudicator sent an email to the plaintiff's solicitors ('AP') and defendant's solicitors ('AP') ('adjudicator's email (8 October 2021)') which stated as follows, among others:

> To the [Defendant]
>
> Thank you for presenting your Adjudication Reply via email and delivery to my office.
>
> *I wish to request that you or the [Plaintiff], provide me with proof/acknowledgement of physical delivery of the same to the [Plaintiff's] representative please.*

Once this is confirmed, service of the Adjudication Reply marks the end of the submission stage in the adjudication process ... (Emphasis added.)

(e) the defendant's solicitors ('AP') replied to the adjudicator's email (8 October 2021) at 10.20am, 8 October 2021 in an email which stated that the defendant's solicitors ('AP') had served the hard copy of the adjudication reply (AR) on the plaintiff's solicitors ('AP') on 7 October 2021 ('defendant's email (8 October 2021)');

(f) at 11.19am, 3 December 2021, Mr Alvin Tan Chi Sian ('from the defendant's solicitors (AP)') sent an email to the adjudicator ('defendant's email (3 December 2021)') which, among others, sought the adjudicator's confirmation regarding the date for the delivery of the adjudication decision ('AD'). Mr Alvin Tan is the defendant's learned counsel in this OS;

(g) the adjudicator sent an email at 1.05pm, 3 December 2021 in reply to the defendant's email (3 December 2021) ('adjudicator's email (3 December 2021)). According to the adjudicator's email (3 December 2021), among others:

To the [Defendant]

...

As for the date for the delivery of the decision, the latest date that the decision can be issued is 15 December 2021. (Emphasis added.)

There was no reply to the adjudicator's email (3 December 2021) by both plaintiff's solicitors ('AP') and defendant's solicitors ('AP'); and

(h) the AD was 'delivered' to the plaintiff and defendant on 14 December 2021. According to the AD, among others:

(i) the plaintiff shall pay a sum of RM1,659,949.76 to the defendant for the works ('adjudicated amount');

(ii) various costs and fees as stated in the AD shall be paid by the defendant to the plaintiff; and

(iii) the plaintiff shall pay to the defendant interest on the adjudicated amount as stipulated in the AD.

THIS OS

[4] The plaintiff has prayed for the following orders in this OS:

(a) a declaration that the AD is void under s 12(3) of the CIPAA;

(b) the entire AD be set aside by the court pursuant to s 15(d) of the CIPAA;

(c) all fees and expenses paid to the adjudicator by both the plaintiff and defendant be refunded to the respective parties; and

(d) costs of this OS shall be borne by the defendant.

[5] In addition to the three novel issues stated in the above para 1, this OS raises the following questions:

(a) whether the omission by the plaintiff's solicitors ('AP') and defendant's solicitors ('AP') to reply to the adjudicator's email (3 December 2021) constituted an agreement between the plaintiff and defendant to extend the prescribed time period (s 12(2)(a)) within the meaning of s 12(2)(c) of the CIPAA ('parties' agreement (s 12(2)(c))'); and

(b) should the court exercise its discretion under O 59 rr 2(2) and 3(2) of the Rules of Court 2012 ('the RC') not to award any costs for this OS in view of the adjudicator's failure to 'make' the AD within the prescribed time period (s 12(2)(a))?

RELEVANT CIPAA PROVISIONS

[6] I reproduce below the long title, definition of 'working day' in s 4, ss 12(1)–(3), 13(a), (c), 15(d), 19(5), (6) and 25(p) of the CIPAA:

> Long title — *An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry* and to provide for connected and incidental matters.
>
> s 4 *Interpretation*
>
> *In this Act, unless the context otherwise requires —*
>
> ...
>
> *'working day' means a calendar day but exclude weekends and public holidays applicable at the State or Federal Territory where the site is located.*
>
> s 12(1) *The adjudicator shall conduct the adjudication in the manner as the adjudicator considers appropriate within the powers provided under section 25.*
>
> (2) *Subject to subsection 19(5), the adjudicator shall decide the dispute and deliver the adjudication decision within —*
>
> (a) *forty-five working days from the service of the adjudication response or reply to the adjudication response, whichever is later*;
>
> (b) forty-five working days from the expiry of the period prescribed for the service of the adjudication response if no adjudication response is received; *or*
>
> (c) *such further time as agreed to by the parties*.

(3) *An adjudication decision which is not made within the period specified in subsection (2) is void.*

...

s 13 *Effect of adjudication decision*

The adjudication decision is binding unless —

(a) it is set aside by the High Court on any of the grounds referred to in section 15

...

(c) *the dispute is finally decided by arbitration or the court.*

s 15 *Improperly procured adjudication decision*

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

...

(d) *the adjudicator has acted in excess of his jurisdiction.*

s 19 *Adjudicator's fees and expenses, etc.*

...

(5) *Before releasing the adjudication decision to the parties, the adjudicator may require full payment of the fees and expenses to be deposited with the Director of the KLRCA* (now AIAC — please refer to s 3(1) of the Arbitration (Amendment) Act 2018 (Act A1563)).

(6) *An adjudicator is not entitled to any fees or expenses relating to the adjudication if the adjudicator fails to decide the dispute within the period specified under subsection 12(2) except when the delay in the delivery of the decision is due to the failure of the parties to deposit the full payment of the adjudicator's fees and expenses with the Director of the KLRCA under subsection (5).*

s 25 *The adjudicator shall have the powers to —*

...

(p) *extend any time limit imposed on the parties under this Act as reasonably required.* (Emphasis added.)

OBJECT OF CIPAA (OBJECT (CIPAA))

[7] It is decided in *Integral Acres Sdn Bhd v BCEG International (M) Sdn Bhd and other cases* [2021] MLJU 1889; [2021] 6 MLRH 540 at paras [11]–[12], as follows:

[11] *It is clear that the Object (CIPAA) is to ensure that parties who have performed 'construction work' (as defined in s 4 of the CIPAA), are paid for the works and are not deprived of cash flow (the life-blood of the construction industry) — please refer to the Long Title to CIPAA (CIPAA is to 'facilitate regular and timely payment, to provide a*

mechanism for speedy dispute resolution through adjudication, to provide for remedies for the recovery of payment in the construction industry') (Long Title) and the judgment of the Federal Court delivered by Mohd Zawawi Salleh FCJ in Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2020] 6 MLJ 224; [2019] 5 AMR 516, at [51].

[12] *I am of the following view regarding the Object (CIPAA)*:

(1) *Part 1 of the Interpretation Acts 1948 and 1967 (IA) applies to CIPAA by virtue of s 2(1)(a) of the IA (CIPAA is enacted after 18 May 1967). According to s 17A of the IA (in Part 1 of IA), an Act of Parliament should be construed in a manner which would promote the object of the Act (Purposive Interpretation) — please see the Federal Court's judgment in Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265. *Accordingly, a Purposive Interpretation should be applied for all the provisions in CIPAA so as to attain the Object (CIPAA).*

(2) *according to s 13(c) of the CIPAA, an adjudication decision regarding a claim for payment for construction work is subject to a final decision of the court or arbitral tribunal (if parties have agreed to an 'arbitration agreement') regarding the same claim (Litigation/Arbitration) — please refer to MRCB Builders v Wazam Ventures* [2020] 5 MLRH 138, *at (13(1)(d)). Hence, any injustice, error and/or omission in an adjudication decision is not fatal and may be remedied subsequently in a Litigation/Arbitration.*

(3) *to achieve the Object (CIPAA), adjudication proceedings should be —*

(a) *simple*

(b) *speedy (as stated in the Long Title); and*

(c) *economical*

for claimants and respondents. The following reasons do not support a legalistic, cumbersome, technical and/or costly approach to be adopted in adjudication proceedings —

(i) *adjudicators are required to deliver adjudication decisions within the time periods stipulated in* s 12(2)(a) or (b) of the CIPAA *(unless the parties agree to an extension of time for the adjudicator to deliver the adjudication decision under s 12(2)(c) of the CIPAA). Any non-compliance with s 12(2)(a) to (c) of the CIPAA will render the adjudication decision void — please see s 12(3) of the CIPAA. If adjudication proceedings are legalistic, cumbersome and technical, adjudicators may have an onerous task to deliver their adjudication decisions within the strict time-lines prescribed by s 12(2)(a)–(c) of the CIPAA.* ... (Emphasis added.)

WHEN ARE ADJUDICATORS REQUIRED TO 'MAKE' ADJUDICATION DECISIONS?

[8] Section 12(2) of the CIPAA provides that an adjudicator shall 'decide' and 'deliver' the adjudication decision within any one of the three following time periods ('three prescribed time periods):

(a) the prescribed time period (s 12(2)(a)); A

(b) the time period stipulated in s 12(2)(b) of the CIPAA ('prescribed time period (s 12(2)(b))'); and

(c) the time period as per the parties' agreement (s 12(2)(c)).

B

[9] The term 'decide' is used in ss 12(2) and 19(6) of the CIPAA while s 19(5) of the CIPAA refers to the root word 'release'. Section 12(3) of the CIPAA however employs the term 'made'. The terms 'decision', 'made', 'delivery' and 'release' are not defined in s 4 of the CIPAA. Nor are such terms defined in s 3 of the Interpretation Acts 1948 and 1967. C

[10] In the High Court case of *Celtex Supreme Sdn Bhd v Mega Bina Garisan Sdn Bhd* [2021] MLJU 2061; [2021] 1 LNS 630 at paras [20]–[24], [28]–[29] and [31], Lim Chong Fong J has decided as follows: D

> [20] *For purposes of this application, it must be appreciated that there is a vital distinction between the making and the delivery/release of the decision.*
>
> [21] *In respect of the making of an adjudication decision, Peter Coulson J in Cubbitt Building and Interiors Ltd v Fleetglade Limited Ltd 110 ConLR 36 decided as follows with emphasis added by me:* E
>
> > [82] *The critical question, which is principally one of fact, is whether the decision was completed before the end of 24 November 2006, I have concluded, taking into account all the relevant evidence, that it was. There are a number of particular factors that seems to me to point inexorably to that conclusion.* F
> >
> > [83] *First, I note that the decision itself was dated 24 November … Thus on the face of the documents the decision was reached within the agreed period. The fact that it was sent out just twelve-and-a-half hours later … also suggested that it was completed on 24 November.*
> >
> > [84] Secondly, the adjudicator's evidence was that he had completed his findings on the previous day, 23 November, and then completed the entirety of the decision itself late by 24 November. He emphasise that but for the lien, he would have sent out the decision late on the 24th. On the basis of that evidence too it seems to me that I am obliged to find that the decision was complete on 24 November. G H
> >
> > ...
>
> [23] *On my reading of the CIPAA, I hold that the adjudication decision must be made strictly in accordance with the timeline stipulated in s 12(2) of the CIPAA. This is irrespective of the lien the adjudicator has over the decision. By s 19(5) of the CIPAA, the adjudicator however, by virtue of the lien, is entitled to withhold the delivery/release of the adjudication decision and only release and deliver the adjudication decision to the parties within reasonable time after the adjudicator's fees are secured by having been paid to the AIAC.* I

A [24] *My interpretation is bolstered by the Bahasa Malaysia version of the CIPAA whereby it has been made clear that the adjudicator's fees are forfeited if the adjudication decision has not been made within the prescribed time*.

...

B [28] *As alluded to in Cubbitt Building and Interiors Ltd v Fleetglade Limited, the time of making of the decision is a question of fact. The adjudicator here has signed off the decision on 22 May 2020 as seen on the face of the decision. There is no other indicia suggesting otherwise and I therefore find and hold accordingly*.

[29] *Pursuant to s 12(2)(a) of the CIPAA, the time limit of making the Decision is on*
C *3 March 2020. This is not disputed by the parties. Accordingly, I find and hold that the decision which has been made on 22 May 2020 contravened s 12(3) of the CIPAA and is hence void. It is immaterial that the adjudicator had a lien on the decision due to late payment of fees because the statute only provides extended time for the release/delivery but not the making of the decision*.

D ...

[31] *This decision serves as an exemplar and caution to adjudicators that they do not have extra time to write and make the adjudication decision beyond the prescribed 45 working days as specified in s 12(2)(a) or (b) of the CIPAA notwithstanding that their fees have not been paid in time and secured with the AIAC*. (Emphasis added.)

E

[11] I am of the following view regarding ss 12(2), (3), 19(5) and (6) of the CIPAA:

(1) the key word is 'made' and not 'decide', 'deliver' or 'release'. This is due to
F the following reasons —

(a) s 12(3) of the CIPAA mandatorily requires an adjudicator to 'make' ('not 'decide', 'deliver' or 'release') an adjudication decision within any one of the three prescribed time periods; and

G (b) s 4 of the CIPAA has defined an 'adjudication decision' as a decision 'made' by an adjudicator under s 12(2) of the CIPAA

(2) it is decided in *Celtex Supreme* at para [24], that s 19(6) of the CIPAA requires adjudicators to 'make' adjudication decisions within any one of the three prescribed time periods.

H

The term 'make' is different from the word 'decide'. Form 15 in Schedule 1 to AIAC's 'Adjudication Rules and Procedure' ('ARP') provides a sample format of an adjudication decision ('Form 15'). According to Form 15, an adjudicator should sign and date the adjudication decision.
I Hence, an adjudication decision is 'made' once the adjudicator has signed and dated the adjudication decision.

I will discuss the effect of APR in para 12 below;

(3) as decided in *Celtex Supreme* at para [20], the 'making' of an adjudication decision is different from the 'delivery' or 'release' of the adjudication

decision. In this regard, the terms 'delivery' and 'release' have the same meaning — *Celtex Supreme* at para [20]. In the Court of Appeal case of *IRDK Ventures Sdn Bhd v Econpile (M) Sdn Bhd and another appeal* [2020] MLJU 939; [2020] 5 MLRA 515 at para [48], Umi Kalthum Abdul Majid JCA has used both the terms 'delivery' and 'release' interchangeably;

(4) if an adjudication decision is 'made' beyond any one of the three prescribed time periods, the adjudication decision is void according to s 12(3) of the CIPAA. This is clear from the following decisions:

(a) in the High Court case of *Skyworld Development Sdn Bhd v Zalam Corp Sdn Bhd and other appeals* [2019] MLJU 162 at paras [94]–[95] and [98], Lee Swee Seng J (as he then was) has decided as follows:

> [94] *The UK Courts had held that the jurisdiction of the adjudicator expired on the expiry of the statutory time limit for making his decision. As the decision was made out of time, the adjudicator had acted out of his jurisdiction or exceeded his jurisdiction granted to him under the CIPAA wherein he was required to deliver his decision within the strict timeframe as provided under s 12(2) of the (CIPAA). The decision delivered one day late was therefore void and unenforceable under s 12(3). See: Ritchie Brothers (PWC) Ltd v David Philp (Commercials) Ltd* [2005] BLR 384 *at para 46* and *Epping Electrical Co Ltd v Briggs & Forrester (Plumbing Services) Ltd* [2007] BLR 126.
>
> [95] *The adjudication decision delivered a day late on 26 July 2018 was void under s 12(3) of the CIPAA. I had thus granted the declaration prayed for by. Correspondingly the adjudication decision was set aside as the adjudicator had acted in excess of his jurisdiction which expired on midnight of 25 July 2018*.
>
> ...
>
> [98] *Pursuant to s 19(6) of the CIPAA, I had further ordered that all the fees and expenses paid to the adjudicator be refunded to AIAC forthwith for AIAC to refund to the parties*. (Emphasis added.);

(b) *Celtex Supreme* at para [29]; and

(c) Aliza Sulaiman J has delivered the following judgment in the High Court in *MRCB Builders Sdn Bhd v SMM Resources Sdn Bhd and another case* [2021] MLJU 1455 at paras [30], [43]–[45] and [47]:

> [30] *As alluded to earlier, the parties agree over at least one matter and that is the due date for the adjudicator to deliver the AD which is on or before 26 March 2020. Another fact which was not disputed by SMM is that the adjudicator had transmitted the AD to the parties vide the e-mail she sent at 5.24pm on 2 April 2020. The adjudicator has no power to unilaterally extend the time limited for delivery of the AD. Pursuant to para 12(2)(c)*

CIPAA, the adjudicator is required to obtain the agreement of the parties for an extension of time beyond the mandatory statutory period as provided in para 12(2)(a) of the CIPAA. There is no evidence that this was done in this case. Therefore, based on the dates alone, the adjudicator has exceeded the timeline of 45 working days by seven days.

...

[43] *In the premises, the court is constrained to hold that by delivering the AD on 2 April 2020, the adjudicator had run foul of the mandatory requirement in para 12(2)(a) of the CIPAA and this renders the AD to be void as stipulated under s 12(3) of the CIPAA.*

[44] *The rationale for (s 12(3) of the CIPAA) is obvious from the long title of the Act itself as the statutory adjudication regime is intended to provide the means to speedily resolve disputes between parties in construction contracts relating to construction works albeit on a temporary basis* (see Construction Adjudication in Malaysia (at pp 335–336)) ...

[45] *Similarly, the AD here was set aside under s 15(d) of the CIPAA as the adjudicator had acted in excess of her jurisdiction which expired on 26 March 2020*.

...

[47] *Based on the foregoing reasons, the declaration granted to MRCB Builders is in the terms as stated in para 43 above and the setting aside application was accordingly allowed with costs of RM7,000 and the enforcement application was dismissed with costs of RM3,000* ... (Emphasis added.);

(5) in view of the far-reaching effect of s 12(3) of the CIPAA, there is a need to ascertain when an adjudication decision is 'made' (not 'decided') by the adjudicator. Premised on *Cubbitt Building and Interiors Ltd v Fleetglade Ltd* [2006] 110 ConLR 36 and *Celtex Supreme*, when an adjudicator 'makes' an adjudication decision is a question of fact which depends on, among others, the following evidence:

(a) what is the date stated on the first and last pages of the adjudication decision. According to Form 15, an adjudicator should state the date of the adjudication decision on the first and last pages of the adjudication decision; and

(b) what is the date of the adjudicator's email, notice or letter to the parties (to which the adjudication decision is attached or enclosed). In this regard, s 38(a)–(d) of the CIPAA has provided for certain modes of service of notices and 'any other document' (including an adjudication decision) under CIPAA;

(6) if an adjudicator has 'made' an adjudication decision within any one of the applicable three prescribed time periods and if the fees and expenses

regarding the adjudication (fees/expenses) have not been deposited in full by the parties with AIAC's Director (director):

(a) the adjudicator is entitled not to 'deliver' or 'release' the adjudication decision to the parties until the fees/expenses have been deposited by the parties in full with the director — please refer to the opening words in s 12(2) read with s 19(5) of the CIPAA and reg 8(1)(e) of the Construction Industry Payment and Adjudication Regulations 2014 ('the CIPAR'). CIPAR has been made by the Minister of Public Works (as defined in s 4 of the CIPAA) pursuant to s 39 of the CIPAA and has legal effect. Regulation 8(1)(e) of the CIPAR provides as follows:

> reg 8 *Fees and expenses of adjudicator.*
>
> (1) *For the purpose of [s 19 CIPAA] —*
>
> ...
>
> (e) *the adjudicator shall release the adjudication decision to the parties in dispute upon full payment of the adjudicator's fees and expenses to be deposited with the [Director] by the parties in dispute* ... (Emphasis added.)

Rule 9(5) APR states as follows:

> r 9 Fees and Expenses
>
> ...
>
> (5) *In the event full payment of the fees and expenses, including the AIAC's administrative fee and any taxes as may be imposed by the Government, are not deposited with the [Director] under [s 19(5) CIPAA], the adjudicator shall not release the adjudication decision to the parties*; and

(b) the adjudication decision is not void under s 12(3) of the CIPAA despite the fact that the adjudication decision has been 'delivered' or 'released' by the adjudicator to the parties beyond any one of the applicable three prescribed time periods. This is clear from the following judgment of the Court of Appeal in *IRDK Ventures* at paras [41], [42] and [48]:

> [41] *After having perused the abovementioned provisions and after careful perusal of the chronology of facts, we were of the view that the act of withholding the delivery of the decision by the adjudicator was with a legitimate basis. It was clear to us there was still an outstanding fees and payment in the form of GST that was still pending to be paid to the KLRCA.*
>
> [42] *To recapitulate, both parties have agreed that the adjudicator is to deliver his decision on 30 October 2015. This was by way of an extension*

from 6 October 2015, that was consented by both parties. The adjudicator had then sent a reminder to both parties on 6 October 2015 for parties to make the necessary payment of RM 258.32m on 29 October 2015 being the GST to the KLRCA.

...

[48] *It is our unanimous view that the Adjudication Decision was delivered within time and the same was released to the parties soon after confirmation that the GST payment to the KLRCA had been duly paid pursuant to the KLRCA's Standard Terms of Appointment of the adjudicator as provided under Schedule II of the KLRCA Adjudication Rules and Procedure, to which the parties had agreed to adhere to. Thus, it is our decision that the adjudicator's decision was valid.* (Emphasis added.); and

(7) if:

(a) an adjudication decision has not been 'made' within any one of the applicable three prescribed time periods; and

(b) the fees/expenses have not been deposited in full with the Director the adjudication decision is void pursuant to s 12(3) of the CIPAA — please refer to *Celtex Supreme*, at [23], [24], [29] and [31].

If adjudicators can rely on a party's failure to deposit in full the Fees/Expenses with the Director without 'making' the adjudication decisions within any one of the applicable three prescribed time periods, this will allow adjudicators to circumvent the mandatory provisions of s 12(2)(a)–(2)(c) and (3) of the CIPAA. In this manner, the object (CIPAA) is defeated because adjudication proceedings cannot be disposed of expeditiously.

[12] ARP have been made by AIAC pursuant to ss 32(a)–(d), 33(1) and (2) of the CIPAA. I have expressed the following view regarding the effect of ARP in *Granstep Development Sdn Bhd v Tan Chong Heng Construction Sdn Bhd and other cases* [2021] MLJU 2473 at paras [65]–[66]:

[65] *I am of the opinion ARP are not 'subsidiary legislation' made under* s 39 of the CIPAA *and have no legal effect. This view is premised on the following reasons:*

(1) *s 39 of the CIPAA empowers the 'Minister' (defined in* s 4 of the CIPAA *as the Minister charged with the responsibility for works) to make regulations. Pursuant to s 39 of the CIPAA, the Minister has made Construction Industry Payment and Adjudication Regulations 2014 which are enforceable as 'law', 'written law' and 'subsidiary legislation' under the definition of 'law' in Article 160(2) (Federal Constitution) read with the definitions of 'law', 'written law' and 'subsidiary legislation' in s 3 IA (Interpretation Acts 1948 and 1967)*; *and*

(2) *unlike s 39 of the CIPAA, ss 32 and 33 of the CIPAA do not confer any power on AIAC to make regulations or subsidiary legislation. Consequently, ARP are not 'law', 'written law' and 'subsidiary legislation' according to the definition of*

'law' in article 160(2) FC read with the definitions of 'law', 'written law' and 'subsidiary legislation' in s 3 IA.

[66] *As explained in the above paragraph 65, (Granstep Development Sdn Bhd) cannot rely on r 2(1) ARP which has no legal effect. Having said that, it is prudent for all claimants and respondents to comply with ARP.* (Emphasis added.)

DID ADJUDICATOR 'MAKE' AD WITHIN PRESCRIBED TIME PERIOD (S 12(2)(A))?

[13] Mr Alvin Tan has submitted that the AD had been made within the prescribed time period (s 12(2)(a)). Regrettably, I am not able to accede to this contention. As correctly submitted by the plaintiff's learned counsel, Mr Ooi Huey Miin, the adjudicator was required by the prescribed time period (s 12(2)(a)) to 'make' the AD on Monday, 13 December 2021 but the AD was only 'made' on Tuesday, 14 December 2021. This decision is premised on the following evidence and reasons:

(a) according to s 12(2)(a) of the CIPAA, the prescribed time period (s 12(2)(a)) of 45 'working days' commences on the day of service of the adjudication response or AR, which is later.

The defendant's AR was served on the plaintiff's solicitors ('AP') on 7 October 2021 — please refer to the defendant's email (8 October 2021). Hence, the prescribed time period (s 12(2)(a)) commenced on 7 October 2021. In this regard, I rely on the following judgment of *Skyworld Development* at paras [34], [35] and [38]:

[34] *The matter in dispute between the parties boils down to the date of service of the (AR) in question*. The key dates and which cannot be seriously disputed with respect to the (AR) in question are these:

(i) *the (AR) was dated 21 May 2018. This is clear and unambiguous*;

(ii) *the (AR) was served by Zalam to Skyworld and the adjudicator vide email on 21 May 2018*;

(iii) the adjudicator confirmed and acknowledged receipt on the service of the (AR) on the same day ie on 21 May 2018; See: exh LTH–23, p 418, Skyworld's affidavit in support for the setting aside application; and

(iv) Form 6 does not provide any cut off time for the service of adjudication papers (which includes the adjudication reply) and the effect of service after certain hours.

[35] *Was the effective date of service of the adjudication reply in question on 21 May 2018? Or was it served on 22 May 2018 as argued by learned counsel for Zalam who argued that since it was served after normal business hours on 21 May 2018 as found by default in the legal firm's letterhead of the legal firm of which the adjudicator is a partner, then it should be considered as effectively served the next day 22 May 2018?*

A ...

[38] *In the premise, 45 working days after the service of the adjudication reply on 21 May 2018 (starting counting from the next day since it is 'after', ie 22 May 2018) would be on 25 July 2018*. (Emphasis added.);

B (b) the site of the works is located in Selangor Darul Ehsan. Accordingly, by virtue of the definition of 'working day' in s 4 of the CIPAA, the computation of the prescribed time period (s 12(2)(a)) excludes weekends and public holidays in Selangor Darul Ehsan;

C (c) after excluding all weekends and two public holidays in Selangor Darul Ehsan (namely, Prophet Muhammad's Birthday (19 October 2021) and Deepavali (4 November 2021)), the prescribed time period (s 12(2)(a)) ended on Monday, 13 December 2021; and

(d) the AD was only 'made' on Tuesday, 14 December 2021, after the expiry D of the prescribed time period (s 12(2)(a)) on 13 December 2021. The following evidence supports this finding of fact:

(i) the first page of the AD stated that the AD was 'signed and issued' by the adjudicator on 14 December 2021;

E (ii) the last page of the AD contained the adjudicator's signature and above the adjudicator's signature were the words 'Dated this 14th December 2021'; and

(iii) the AD was sent by the adjudicator to the plaintiff's solicitors ('AP') and defendant's solicitors ('AP') by way of the adjudicator's letter F dated 14 December 2021.

WAS THERE PARTIES AGREEMENT (S 12(2)(c)) IN THIS CASE?

G **[14]** Mr Alvin Tan attempted to persuade the court that when the plaintiff's solicitors ('AP') and defendant's solicitors ('AP') did not object or reply to the adjudicator's email (3 December 2021) (which stated, among others, that the last date for the adjudicator to deliver the AD was purportedly on 15 December 2021), both the plaintiff and defendant had agreed to extend the prescribed time period within the meaning of s 12(2)(c) of the CIPAA. H

[15] I am not able to accept the above submission due to the following reasons:

I (a) Form 13 in Schedule 1 to ARP (Form 13) has provided for a written request by an adjudicator to the parties for the parties' agreement (s 12(2)(c)). It is clear from Form 13 that before there can be any parties' agreement (s 12(2)(c)), there must have been a written request by the adjudicator in question. This is understandable because if adjudicators can 'make' adjudication decisions within the prescribed time period

(s 12(2)(a)) or prescribed time period (s 12(2)(b)), there is no necessity for adjudicators to send Form 13 to the parties. Obviously, parties do not have the prescience to know if an adjudicator is able to 'make' an adjudication decision within the prescribed time period (s 12(2)(a)) or prescribed time period (s 12(2)(b)) until and unless the adjudicator has sent Form 13 to the parties for the consideration and agreement of the parties.

Form 13 has been relied on in *Skyworld Development*, at [68]–[72], as follows:

> [68] If indeed the adjudicator had wanted the agreement of the parties to the fact that an email sent after a certain working hours is to be considered as effective service only on the next day, he could have stated so.
>
> [69] *This does not derogate from the power given to the parties to extend the time given to the adjudicator to deliver his adjudication decision. However in such a case there is a prescribed form in (Form 13)* ...
>
> [70] *The extension of time is at the request of the adjudicator and to avoid any ambiguity and confusion, it is to be in writing in Form 13* the body of which reads as follows:
>
> ...
>
> [71] *The agreement to extend time should be in writing as implied from the written request from the adjudicator to the parties seeking to extend time for him to deliver his adjudication decision. The recommended practice then is that the request shall be made before the last day to deliver his decision as para 3 above of Form 13 envisaged the parties being allowed some time to revert to the adjudicator on their agreement or otherwise to the extension sought by the adjudicator*.
>
> [72] *Here there is no request from the adjudicator to extend the time for him to deliver his adjudication decision as he was labouring under his misconceived understanding that his last day was 26 July 2018*. (Emphasis added.)

(b) in the High Court case of *Pasukhas Sdn Bhd v Empire Multiple Sdn Bhd and another appeal* [2019] MLJU 1393; [2019] 1 LNS 757 at para [30], Lee Swee Seng J (as he then was) has expressed the following view that by virtue of s 12(2)(c) of the CIPAA, the parties' agreement (s 12(2)(c)) should be in writing:

> [30] *It is also pertinent to note that whilst an Adjudication Decision made outside the timeline in (s 12(2) of the CIPAA) is expressly stated to be void under s 12(3) unless both the Claimant and Respondent had agreed in writing to an extension of time*, there is no such sanction attached to a non-compliance with s 12(5) of the (CIPAA) as one can hardly envisage how an adjudication decision can be bereft of stating the adjudicated amount and with that the time of payment. (Emphasis added.);

(c) in *MRCB Builders* at para [30], the High Court has held that an adjudicator is required to obtain the parties' agreement (s 12(2)(c)) and

has 'no power to unilaterally extend' the prescribed time period (s 12(2)(a)) or prescribed time period (s 12(2)(a)); and

(d) if I have accepted the above submission by Mr Alvin Tan, this will allow adjudicators to render nugatory s 12(3) of the CIPAA in the following manner:

(i) an adjudicator may simply send an email, notice or letter to the parties which contains the adjudicator's mistaken computation of the prescribed time period (s 12(2)(a)) or prescribed time period (s 12(2)(a)) (adjudicator's mistake); and

(ii) the parties in the adjudication proceedings may have inadvertently failed to correct the adjudicator's mistake.

The above scenario is contrary to the object (CIPAA) because as explained in this judgment, notwithstanding the adjudicator's mistake, any adjudication decision 'made' beyond any one of the three prescribed time periods is void under s 12(3) of the CIPAA.

WHETHER ADJUDICATORS HAVE POWER TO EXTEND UNILATERALLY PRESCRIBED TIME PERIOD (S 12(2)(a)) AND PRESCRIBED TIME PERIOD (S 12(2)(b))

[16] Mr Alvin Tan contends that the adjudicator has the power under s 12(1) read with s 25(p) of the CIPAA to extend unilaterally the prescribed time period (s 12(2)(a)).

[17] With regard to the above submission of Mr Alvin Tan, I will take the opportunity to decide whether adjudicators have the power pursuant to s 12(1) read with s 25(p) of the CIPAA to extend the prescribed time period (s 12(2)(a)) and prescribed time period (s 12(2)(b)) in the following two sets of circumstances (two situations):

(a) an adjudicator acts on his or her own initiative to extend the prescribed time period (s 12(2)(a)) or prescribed time period (s 12(2)(b)) without any application by the parties in question ('first situation); and

(b) when one party in the adjudication proceedings applies to an adjudicator to extend the prescribed time period (s 12(2)(a)) or prescribed time period (s 12(2)(b)) ('second situation'). The second situation includes the case when one party in an adjudication applies to the adjudicator to extend the prescribed time period (s 12(2)(a)) or prescribed time period (s 12(2)(b)) but the other party opposes such an application.

[18] The questions posed in the above para 17, in my view, should be answered 'no' with regard to the two situations. My reasons are as follows:

(a) s 25(p) of the CIPAA only applies to 'any time limit imposed on the parties' (not adjudicators) under CIPAA. Section 25(p) of the CIPAA does not apply to a time period imposed on adjudicators, such as the prescribed time period (s 12(2)(a)) and prescribed time period (s 12(2)(b)). It is therefore clear that a literal interpretation of s 25(p) of the CIPAA does not support the adjudicator's power under s 25(p) of the CIPAA to extend the prescribed time period (s 12(2)(a)) and prescribed time period (s 12(2)(b)) in the two situations;

(b) if s 25(p) of the CIPAA allows an adjudicator to unilaterally extend the prescribed time period (s 12(2)(a)) and prescribed time period (s 12(2)(b)) in the two situations, this will inevitably delay adjudication proceedings and is thereby inconsistent with the object (CIPAA). In other words, a purposive construction of s 25(p) of the CIPAA clearly shows the intention of legislature that s 25(p) of the CIPAA does not empower adjudicators to extend the prescribed time period (s 12(2)(a)) and prescribed time period (s 12(2)(b)) in the two situations;

(c) if I have allowed adjudicators to extend the prescribed time period (s 12(2)(a)) or prescribed time period (s 12(2)(b)) in the first situation, this will confer a *carte blanche* for adjudicators to delay the 'making' of adjudication decisions at their whims and fancies. Such an outcome defeats the object (CIPAA) because adjudication proceedings cannot then be concluded speedily; and

(d) if the court allows an adjudicator to extend the prescribed time period (s 12(2)(a)) or prescribed time period (s 12(2)(b)) in the second situation, namely when only one party in the adjudication applies to extend the prescribed time period (s 12(2)(a)) or prescribed time period (s 12(2)(b)) in the first situation, this is clearly contrary to parliament's intention in providing for the parties agreement (s 12(2)(c)). In other words, if one party in an adjudication proceedings (Y) disagrees with the other party's (Z) application to extend the prescribed time period (s 12(2)(a)) or prescribed time period (s 12(2)(b)), this simply means that no parties agreement (s 12(2)(c)) has been reached between Y and Z. Hence, in the absence of the parties agreement (s 12(2)(c)), an adjudicator is mandatorily obliged under s 12(3) of the CIPAA to 'make' the adjudication decision within the prescribed time period (s 12(2)(a)) or prescribed time period (s 12(2)(b)).

IS THE PLAINTIFF ESTOPPED FROM RELYING ON BREACH (S 12(2))?

[19] Mr Alvin Tan has cited a host of cases to support his submission that the doctrine of equitable estoppel bars the plaintiff from applying to set aside the AD because the plaintiff did not reply to, let alone correct, the adjudicator's

email (3 December 2021) (which stated that the latest date for the AD to be 'issued' was 15 December 2021).

[20] I unhesitatingly decide that the equitable estoppel doctrine cannot apply to bar an application to set aside an adjudication decision based on a breach (s 12(2)). This decision is premised on the following reasons:

(a) the equitable estoppel doctrine is based on case law. Case law is subject to written law which embodies the intention of the legislature. In this case, the equitable doctrine of estoppel cannot apply in view of the mandatory provisions of s 12(2)(a)–(c) and (3) of the CIPAA.

I have decided as follows in *Jambatan Merah Sdn Bhd v Public Bank Berhad* [2015] MLJU 1208; [2016] 1 CLJ 811 at para [78], as follows:

> [78] In respect of the defendant's purported right to exercise remedy as a chargee under s 271(1)(a) of the NLC, *it is trite law that there can be no application of the issue estoppel doctrine against the operation of a statutory provision* (in this case, the application of s 270(1)(a) of the NLC). *I cite the following cases*:
>
> (a) *in Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404, at p 407, *Hashim Yeop Sani CJ (Malaya) held in the Supreme Court as follows*:
>
> *On the question of issue estoppel we agree with the learned judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. There can be no estoppel as against statutory provisions.* (Emphasis added.);
>
> (b) *Thomas CJ decided as follows in the Court of Appeal of the Federated Malays States in Puran Singh v Kehar Singh* [1939] 1 MLJ 71 at p 75:
>
> *The main question argued at the appeal was that the learned trial judge having held that the registration of Kehar Singh as proprietor of certain lands had been obtained by means of an insufficient or void instrument, viz., an invalid power of attorney, and that it was in consequence void under s 42 (iii) of the Land Code, he was wrong in holding that the plaintiff was estopped by his conduct from objecting to the registration. In support of this contention he cited Borrow's case (1880) 14 ChD 432 in which it is stated by Bacon VC, in the course of his judgment that*:
>
> *the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament*.
>
> This view is followed in the case of *Abdul Aziz v Kanthen Mallik* 38 ILR Cal 512 515 in which at p 515 a long list of authorities has been set out. *The court there decided that it was not prepared to accede to the argument that the principle of estoppel overrides the provisions of either s 78 of the Land Registration Act or s 60 of the Bengal Tenancy Act* ...

So far as this is an argument on the question of estoppel it cannot in my opinion succeed, since it is only another way of saying that acts of the parties inter se can amount to an estoppel in respect of an Enactment. (Emphasis added.); and

(c) in *Re Salvage Engineers Ltd* [1962] 1 28 MLJ 438 at p 440, *Ong J (as he then was) held in the High Court*:

There can be no estoppel against the operation of a statute. (Emphasis added.)

(b) the doctrine of equitable estoppel as applied in Malaysian case law, is based on English rules of Equity. I reproduce below s 3 of the Civil Law Act 1956 ('the CLA'):

Application of UK common law*, rules of equity* and certain statutes

Section 3(1) *Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —*

(a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956 ... (Emphasis added.)

In *Syarikat Faiza Sdn Bhd & Anor v Faiz Rice Sdn Bhd & Anor and another case* [2019] 7 MLJ 175, I have decided that the doctrine of equitable estoppel cannot estop the application of the provisions in the then applicable Trade Marks Act 1976 (replaced by the Trademarks Act 2019). It is decided in *Syarikat Faiza* at paras [103], [104(3)] and [104(4)], as follows:

[103] *Mr Michael Soo has contended, among others, that the plaintiffs are estopped from claiming for Trade Mark Infringement in this case*. A host of cases on the application of equitable estoppel has been cited in support of this contention.

[104] With respect, I am unable to accede to the above submission for the following reasons:

...

(3) ... *It is clear from the opening words in s 3(1) CLA that any application of English rules of Equity is subject to Malaysian written law — please see the Federal Court's judgment delivered by Augustine Paul JCA (as he then was) in Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257, at pp 265–266. *Accordingly, the defendants cannot resort to the equitable estoppel doctrine in the face of express provisions of Malaysian written law in* s 40(1)(a) to (f) and (2) of the TMA;

(4) *there is an equitable doctrine that Equity follows the law (the application of equity shall be subject to the operation of statutes) — please see Chang Min Tat J's (as he then was) decision in the High Court case of Wong Kim Fatt v Leong & Co Sdn Bhd & Anor* [1976] 1 MLJ 140, at p 142; ... (Emphasis added.)

(c) if I have applied the equitable estoppel doctrine to bar the enforcement of a breach (s 12(2)), this will render redundant the mandatory provisions of s 12(2)(a)–(c) and (3) of the CIPAA. Such an outcome clearly frustrates the object (CIPAA).

CAN PLAINTIFF ACQUIESCE TO BREACH (S 12(2))?

[21] Mr Alvin Tan has made a far-reaching submission. According to Mr Alvin Tan, the plaintiff's failure to reply to the adjudicator's email (3 December 2021) amounts to an acquiescence of the breach (s 12(2)).

[22] I am constrained to reject the above contention. Firstly, the doctrine of acquiescence is premised on case law. As explained in the above sub-para 21(1), the application of the acquiescence doctrine is subject to the mandatory provisions of s 12(2)(a)–(c) and (3) of the CIPAA. Furthermore, the invocation of the doctrine of acquiescence in this case is contrary to the object (CIPAA).

DID ADJUDICATOR EXCEED HIS JURISDICTION IN THIS CASE?

[23] Premised on the evidence and reasons stated in the above Parts E to K, the adjudicator had exceeded his jurisdiction within the meaning of s 15(d) of the CIPAA when he 'made' the AD on 14 December 2021, beyond the prescribed time period (s 12(2)(a)). I rely on the following cases:

(a) *Skyworld Development* at paras [94]–[95]; and

(b) *MRCB Builders* at para [45].

SHOULD ADJUDICATOR REFUND FEES/EXPENSES TO PARTIES?

[24] Regulation 8(2)(b) of the CIPAR provides as follows:

> reg 8(2) *The [Director] shall —*
>
> ...
>
> *(b) refund to the parties in dispute any fees and expenses relating to the adjudication if the adjudicator fails to decide the dispute within the period specified under subsection 12(2) [CIPAA].* (Emphasis added.)

[25] The word 'decide' is used in reg 8(2)(b) of the CIPAR (as in s 19(6) of the CIPAA). Having said that, it is decided in *Celtex Supreme* at para [24], that s 19(6) of the CIPAA mandatorily requires adjudicators to 'make' and not merely 'decide' their adjudication decisions within any one of the three prescribed time periods (please also refer to the above sub-paras 11(1), (2) and (4)–(7)).

[26] I am of the view that once an adjudicator fails to 'make' the adjudication decision within any one of the three prescribed time periods, s 19(6) of the CIPAA and reg 8(2)(b) of the CIPAR have mandatory effect and require the adjudicator to refund the fees/expenses to the parties in the adjudication (mandatory refund). The mandatory refund is clear from the following two cases:

(a) *Skyworld Development* at para [98]; and

(b) *Celtex Supreme* at para [24].

The mandatory refund is in consonance with the object (CIPAA) by providing a 'deterrence' in case adjudicators fail to 'make' adjudication decisions within any one of the three prescribed time periods.

[27] In this case, once the adjudicator had failed to 'make' the AD on 13 December 2021, namely, within the prescribed time period (s 12(2)(a)), the adjudicator is obliged to make the nandatory refund pursuant to s 19(6) of the CIPAA and reg 8(2)(b) CIPAR.

[28] My research has revealed r 9(12) of the APR which states as follows:

> *The adjudicator shall be entitled to his fees and expenses notwithstanding that his adjudication decision is subsequently set aside by the Court provided that he has acted in good faith in the performance of his duties under the Act.* (Emphasis added.)

Firstly, as decided in *Granstep Development*, APR may not have legal effect. More importantly, in view of s 19(6) of the CIPAA and reg 8(2)(b) of the CIPAR, if an adjudicator has failed to 'make' the adjudication decision within any one of the three prescribed time periods, the adjudicator is not entitled under r 9(12) of the APR to the fees/expenses even though the adjudicator may have acted in good faith in the performance of the adjudicator's duties under CIPAA.

CAN COURT GRANT DECLARATION REGARDING ADJUDICATION DECISIONS?

[29] I reproduce below s 41 of the Specific Relief Act 1950 ('the SRA') and O 15 r 16 of the RC:

> s 41 SRA *Discretion of court as to declaration of status or right*
>
> *Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief.*

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

O 15 r 16 of the RC *Declaratory judgment*

No action or other proceeding shall be open to objection merely on the ground that a declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed. (Emphasis added.)

[30] According to Mr Alvin Tan, s 15 of the CIPAA only provides for the court's power to set aside adjudication decisions. Mr Alvin Tan then contends that the court has no power under CIPAA to grant any declaration in favour of the plaintiff in this OS.

[31] I have decided as follows in *Ou Yang Chow Min (trading as Ou Yang Architect) v Green Venture Capital Sdn Bhd and another case* [2021] MLJU 130 at para [32]:

[32] *I will now assume that the adjudicator has no jurisdiction to adjudicate Ou's PC and there is no Ou's cause of action (MOA) (two scenarios). In the two scenarios, as explained in Sunshine Construction, at (28(1)), the AD must be set aside by the court on the ground that the adjudicator has no jurisdiction to adjudicate Ou's PC. The question that arises in the two scenarios is whether the court has a discretionary power under s 41 of the SRA and O 15 r 16 of the RC to allow the three Prayers (Declaration). I am of the view that in the two scenarios, the court has no power pursuant to s 41 of the SRA and O 15 r 16 of the RC to allow the three prayers (declaration). This opinion is premised on the following reasons*:

(1) *it is clear from s 13(c) of the CIPAA that all adjudication decisions are 'temporarily final' and are subject to Litigation/Arbitration. The rights and liabilities of parties in adjudication proceedings (Parties Rights/Liabilities) can only be finally determined in the Litigation/Arbitration. The Parties Rights/Liabilities cannot be decided in —*

(a) *adjudication proceedings; and*

(b) *applications to set aside adjudication decisions under* s 15 CIPAA *(s 15 Applications), such as in this OS (WQP and GVC).*

The proviso to s 41 SRA states that the court 'shall' not make any declaration if a plaintiff is 'able to seek further relief than a mere declaration'. Any party against whom an adjudication decision is made (X), can easily resort to Litigation/Arbitration so as to resolve finally X's rights or liability under the construction contract to which X is a party (X's Contract). Consequently, the proviso to s 41 SRA bars X from applying to court in a s 15 Application for any declaratory relief regarding the PC, adjudication proceedings and/or adjudication decision. Furthermore, in a s 15 Application, X cannot apply for any 'binding declarations of right' under O 15 r 16 of the RC *because only the Litigation/Arbitration can finally resolve X's rights and liabilities pursuant to X's Contract*

(2) by virtue of the maxim of statutory interpretation, *generalia specialibus non derogant*, the specific statutory provision of s 13(c) of the CIPAA should be favoured over the general provisions in s 41 of the SRA and O 15 r 16 of the RC

(3) according to the canon of construction, lex posterior derogant non priori, the subsequent statutory provision of s 13(c) of the CIPAA shall prevail over the earlier provisions in s 41 of the SRA and O 15 r 16 of the RC

(4) *if the court has a discretionary power under s 41 of the SRA and O 15 r 16 of the RC to make a declaration concerning the parties rights/liabilities in adjudication proceedings, there is a risk that the court may grant a declaration which may be in conflict with the subsequent outcome of the litigation/arbitration (risk of conflicting decisions). The risk of conflicting decisions undermines the finality of resolution of disputes in construction contracts by way of litigation/arbitration*; and

(5) *if X can apply for declarations in a Setting Aside Application to invalidate a PC, adjudication proceedings and/or adjudication decision, this will defeat the simple, expeditious and economical nature of adjudication proceedings — please refer to Integral Acres Sdn Bhd v BCEG International (M) Sdn Bhd and other cases* [2021] MLJU 1889; [2021] 6 MLRH 540 at para [12]. (Emphasis added.)

[32] As explained in *Ou Yang Chow Min*, in view of s 13(c) of the CIPAA, the court has no power under s 41 of the SRA and O 15 r 16 of the RC to grant any declaration in proceedings under CIPAA regarding the dispute between the parties which can only be finally resolved by way of litigation or arbitration, whichever applicable (parties' dispute).

[33] In this case, the plaintiff is merely seeking for a declaration regarding the validity of the AD under s 12(3) of the CIPAA. The plaintiff is not applying for any declaration regarding the parties' dispute. As such, *Ou Yang Chow Min* is clearly distinguishable from this OS.

[34] Based on the evidence and reasons stated in the above Parts E to L, I exercise my discretion pursuant to s 41 of the SRA and O 15 r 16 of the RC to declare that the AD is void under s 12(3) of the CIPAA. A similar declaration has also been given in the following two cases:

(a) *Skyworld Development* at para [95]; and

(b) *MRCB Builders* at para [47].

WHETHER COURT SHOULD AWARD COSTS IN THIS OS

[35] O 59 rr 2(2) and 3(2) of the RC provide as follows:

O 59 r 2(2) *Subject to the express provisions of any written law and of these Rules, the*

costs of and incidental to proceedings in the Court, shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.

O 59 r 3(2) *If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.* (Emphasis added.)

[36] It is not disputed that the court has a wide discretion under O 59 rr 2(2) and 3(2) of the RC to award costs for this OS. O 59 r 3(2) of the RC has provided for 'costs to follow the event' ('general rule') unless there is a reason for the court to exclude the application of the general rule.

[37] This case is indeed a most unfortunate one where the AD is void under s 12(3) of the CIPAA solely because of the adjudicator's failure to comply with the prescribed time period (s 12(2)(a)) ('adjudicator's fault'). The adjudicator's fault constitutes a sufficient reason for this court to exercise its discretion pursuant to O 59 rr 2(2) and 3(2) of the RC to depart from the general rule. Accordingly, in view of the adjudicator's fault, it is only just for the court not to award any costs to be paid by the defendant to the plaintiff in this OS.

CONCLUSION

[38] Premised on the above evidence and reasons, this OS is allowed with the following orders:

(a) a declaration that the AD is void pursuant to s 12(3) of the CIPAA;

(b) the AD is set aside under s 13(a) read with s 15(d) of the CIPAA; and

(c) the adjudicator shall refund to the plaintiff and defendant all the fees/expenses paid to the adjudicator by the respective parties.

[39] This judgment serves as a reminder for adjudicators to ensure strict compliance with the three prescribed time periods. If otherwise, the adjudication decision shall be nullified under s 12(3) of the CIPAA and the object (CIPAA) may not be attained.

OS allowed.

Reported by Dzulqarnain Ab Fatar